Petition

NO. 81-1522

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF PEACHTREE CITY,

Petitioner

versus

H & H OPERATIONS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether that Section of the Peachtree City Sign Ordinance which prohibits the posting of prices on all commercial signs within the City Limits places an unconstitutional restraint on the Respondent's freedom of commercial speech under the First Amendment of the United States Constitution when that ordinance is based solely on aesthetics.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, City of Peachtree City, prays that the Supreme Court of the United States issue a Writ of Certiorari to review the judgment of the Supreme Court of Georgia, Case No. 37934, reversing the judgment of the Superior Court of Fayette County, Georgia, Civil Action File No. 8725.

OPINIONS DELIVERED BELOW

The only reported opinion of Courts below is that opinion issued by The Supreme Court of Georgia entitled *H & H Operations, Inc. vs. City of Peachtree City* and reported at 248 Ga. 500, _____ SE 2d _____.

JURISDICTIONAL STATEMENT

The judgment which Petitioner seeks to have reviewed was entered by The Supreme Court of Georgia on November 4, 1981. A timely filed Motion for Rehearing was denied on November 18, 1981. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. §1257(3).

STATEMENT OF THE CASE

The City of Peachtree City, a municipal corporation duly organized under the laws of the State of Georgia, enacted a sign ordinance on October 3, 1980.

Section 4(D) of that ordinance does not allow advertisement of prices by outsign within the City Limits.

H & H Operations, Inc., conducts a business in Peachtree City known as "THE PITSTOP CONVENIENCE STORE" which sells gasoline and other products.

H & H requested permission from Peachtree City to erect a sign outside of its convenience store. Both the City Sign Committee and the City Council denied the request since the sign requested contained advertisement of gasoline prices in violation of the Peachtree City Sign Ordinance.

H & H filed a complaint in the Superior Court of Fayette County, Georgia, on April 28, 1981. That complaint, styled as a "Petition for Injunction" asked for a declaration by the Superior Court that the Peachtree City Sign Ordinance is unconstitutionally vague and restrictive and therefore, void, since that ordinance prohibits advertisement of prices.

Peachtree City filed a timely answer to the H & H petition and a hearing was held on the question of the constitutionali-

ty of Section 4(D) of the Sign Ordinance. The Superior Court Judge issued an order on June 29, 1981, which found that the Peachtree City ordinance was valid and constitutional.

The Superior Court found as a fact that the Peachtree City ordinance was based solely on aesthetics, and ruled that aesthetics is a valid basis for exercise of the city's police powers.

H&H appealed to the Supreme Court of Georgia.

The Georgia Supreme Court concurred with the Superior Court and said that Peachtree City could validly regulate pricing by outsign pursuant to its police powers based solely on aesthetics. The Georgia Court, however, did not stop there but went on to declare the City Ordinance unconstitutional since it violates the Respondent's right to freedom of speech. Therefore, the Georgia Supreme Court reversed the Superior Court's decision. This Petition for Writ of Certiorari is filed in response to the decision of the Supreme Court of Georgia.

CONSTITUTIONAL PROVISION AND ORDINANCE

1) U.S. Const. Amend I

2) Peachtree City Sign Ordinance §4 (D)

(D) *Commercial, Industrial and Office Institutional* Each individual commercial business site shall be entitled to display one free-standing and one wall sign per site entry (provided entries are not closer than 250 ft.). Each individual business premise located in industrial or office institutional areas may have one free-standing or one wall sign per entry. (Provided entries are not

closer than 250 feet.) Individual tenant in a multi-tenant complex may have one wall sign in addition to the building/complex identification sign. These signs shall contain only the names of the person, business or activity occupying such premises, the standard business category of products and services available on such premises if not included in the name itself, or a registered logo or trademark which identifies the activity. . . .

ARGUMENT

CERTIORARI SHOULD BE GRANTED SINCE THE DECISION OF THE GEORGIA SUPREME COURT IN THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN AND SHOULD BE SETTLED BY THIS COURT AND SINCE THE GEORGIA COURT'S DECISION IS IN CONFLICT WITH A DECISION OF ANOTHER STATE COURT OF LAST RESORT.

The question presented in this petition is an important federal question. This Court has seen fit to address issues involving freedom of speech in a commercial context in several cases since 1975. *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), *Ohralik v. Ohio Bar Association*, 436 U.S. 447 (1978), *Central Hudson v. Public Service Comm'n.*, 447 U.S. 557 (1980), *Metromedia, Inc. v. City of San Diego*, ——— U.S. ———, 101 S. Ct. 2882, 69 L.Ed 2d 800 (1981).

The extent of a city's right to prohibit price advertising by sign ordinance for aesthetic purposes is also a crucial question which goes to the very heart of the commercial speech issue.

In *Central Hudson v. Public Service Comm'n.*, 447 U.S. 557 (1980), this court held that the commercial price and product advertising is entitled to a lesser degree of first amendment protection than ideological communication. This Court in *Central Hudson* also set up a four-part test to be used in determining the validity of governmental regulations on commercial speech.

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction or otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective.

Central Hudson at 563, 566.

The Supreme Court of Georgia applied the Central Hudson test to the facts of the case at bar. That Court, first found that posting of gasoline prices is entitled to First Amendment Protection since there is no claim that the prices would be misleading. *H & H Operations, Inc. v. City of Peachtree City*, 248 Ga. 500 at 502. The Georgia Court, however, went on to say that the city ordinance at issue is unconstitutional since it fails at step two of the *Central Hudson* test. The Georgia Court gave as its reason for this failure the fact that the city ordinance is based solely on aesthetics which in the court's opinion is not a substantial governmental interest under this Court's four-part test. *H & H Operations, Inc.* at 502.

The decision of the Georgia Court raises a novel question for review by this Court; whether aesthetics is a governmental goal of sufficient substance to justify limitations upon commercial speech.

This Court has in the past recognized on numerous occasions that cities may enact reasonable sign ordinances based on the aesthetic aspect of its police powers. ***Berman v. Parker***, 348 U.S. 26 (1954), ***Penn Central Transportation v. New York***, 438 U.S. 104 (1978), ***Village of Belle Terre v. Borrass***, 416 U.S. 1 (1973).

In ***Berman v. Parker***, Justice Douglas said that "It is within the police power of the legislature to determine that the community should be beautiful as well as healthy . . . ." *Berman v. Parker*, 348 U.S. at 33. Implicit in the Court's determination that zoning ordinances may be based upon aesthetics as a part of legislative police power is the concomitant determination that aesthetics is a substantial governmental goal.

Is aesthetics, a goal which has been determined to be substantial enough to justify invocation of the police powers of a legislative body, a goal without substance when viewed in the commercial speech context?

This Court in ***Metromedia, Inc. v. City of San Diego***, _____ U.S. _____ , 101 S. Ct. 2882, 69 L.Ed. 2d 800 (1981) held that a San Diego sign ordinance was not constitutional since it was drawn broader than necessary and therefore unduly infringed upon property owners' non-commercial freedom of speech. However, in reaching that decision this Court did not decide that the San Diego ordinance was unconstitutional insofar as it prohibited commercial billboards.

In ***Metromedia***, this Court applied the four-part test set out in ***Central Hudson*** and found that "the twin goals which the ordinance seeks to further – traffic safety and the appearance of the City – are substantial governmental goals. It is far too late to contend otherwise with respect to either traffic safety . . . or aesthetics . . . ."

In the case at hand, this Court should grant certiorari and decide whether aesthetics, standing alone, is a "substantial governmental interest" as set out in *Central Hudson* and *Metromedia*.

Further this Court in *Linmark Association, Inc. v. Willingboro*, 431 U.S. 85 (1977) said that even though a sign ordinance may have the effect of chilling some speech, the ordinance could be permissable so long as that ordinance serves a public purpose unrelated to the suppression of free speech. 431 U.S. at 93.

The Peachtree City Ordinance is just such an ordinance. It is intended to serve the public purpose of assuring an aesthetically pleasing environment and any chill on freedom of speech is incidental.

Also, Peachtree City does not attempt in its sign ordinance to squelch all advertising by outsign. The ordinance at issue here permits posting of signs which advertise the identification of the person, business, or activity occupying the premises and provides for identification of the type product sold (Peachtree City Sign Ordinance, Section 4 (D).).

Further, the Georgia Supreme Court cited in support of their decision the case of *People v. Mobil Oil Corp.*, 48 N.Y. 2d 192, 397 N.E.2d 724 (1979). However, the reasoning contained in that decision points to a decision different from the one reached by the Georgia Court. The *Mobil* case involved an ordinance which prohibited gasoline prices only. The New York Court of Appeals held that the ordinance was unconstitutional since it had as its basis no valid public purpose. That Court also said that aesthetics, a valid public purpose, could not be argued to support the ordinance in that case since only gasoline prices were prohibited.

However, in the case before this Court the Peachtree

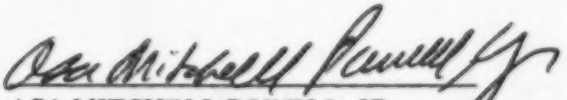
City City Council has determined, using their best judgment, that the valid public purpose of aesthetics is best served by a prohibitation of all prices by outsign. No class of commercial sign is singled out. Based on the reasoning of *Mobil Oil*, the decision of the Georgia Court should be reviewed and ultimately reversed.

The question raised by this case is fundamental for the future of all municipal sign ordinances. If the Georgia Supreme Court's decision is not reversed, an unqualified right to free expression will lead to the demise of all restrictions on speech contained in local sign ordinances which are based solely on aesthetics. Since all sign ordinances restrict speech in some manner, and since portions of all sign ordinances are based solely on aesthetics, a clear statement on the question presented here is desparately needed so that muncipalities can know what can and can't be regulated by sign ordinance.

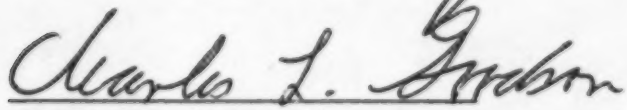
CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted to review the judgment of the Supreme Court of Georgia.

Respectfully submitted,



ASA MITCHELL POWELL, JR.



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CERTIFICATE OF SERVICE

I, the undersigned counsel for the City of Peachtree City, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed by first class mail to the counsel for the Respondent as shown below, with proper postage affixed, this 15th day of February, 1982.

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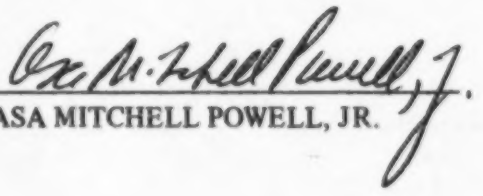

ASA MITCHELL POWELL, JR.

Appendix

APPENDIX A

IN THE SUPERIOR COURT OF FAYETTE COUNTY

STATE OF GEORGIA

CIVIL ACTION FILE NO.
8725

H & H OPERATIONS, INC.,
d/b/a THE PIT STOP
CONVENIENCE STORE,

Plaintiff

Vs.

THE CITY OF PEACHTREE CITY,

Defendant

ORDER ON PETITION FOR INJUNCTION

Plaintiff filed a Petition for Injunction against the City of Peachtree City, Georgia, seeking to enjoin the enforcement of the city's sign ordinance. The ordinance is clearly an attempt to exercise the city's police powers based solely on aesthetics. The issues are: (1) If a municipal corporation, under its police power, can use aesthetics as the sole basis for an ordinance regulating signs; (2) Does the prohibition of posting gasoline prices by out signs under this ordinance render it void.

The Supreme Court of the United States, as well as the Supreme Court of Georgia, has touched on this subject. In the case of *Berman v. Parker*, 348 U.S. 26, the U.S. Supreme Court held as follows:

"the concept of the public welfare is broad

> and inclusive. The values it represents are spiritual as well as physical, *aesthetic* as well as monetary. It is within the police power of the legislature to determine that the community should be beautiful as well as healthy, . . ."

The Georgia Supreme Court, in the case of *Grubbs v. Wooten*, 189 Ga. 390, held as follows:

> "If by the terms 'aesthetic considerations' is meant a regard merely for outward appearances, for good taste in the matter of the beauty of a neighborhood itself, we do not observe any substantial reason for saying that such a consideration is not a matter of public welfare. . . . why should not the police power avail as well to suppress or prevent a nuisance committed by offending the sense of sight, as to suppress or prevent a nuisance committed by offending the sense of hearing or the olfactory nerves."
> *Grubbs* at 400.

In the more recent case of *The City of Smyrna v. Parks*, 240 Ga. 699, 705, Justice Marshall, speaking for the Court, held that aesthetics alone is not an unwarranted exercise of police power. *Thomas v. City of Marietta*, 245 Ga. 485, the most recent case touching on this point, upheld an ordinance of the City of Marietta prohibiting permanent use of mobile signs. This opinion , at Page 846, holds as follows:

> "Although aesthetics are an important incidental effect of regulations, Berman v. Parker, 348 U.S. 26 (1954), aesthetics, being merely a question of subjective taste, would not alone

be enough to support the legislation here under the police power. See *City of Smyrna v. Parks*, 240 Ga. 699 (242 SE2d 73) (1978)."

After careful study by this Court of the *Berman* and *City of Smyrna* cases, this Court is unable to find a direct holding in either of these cases that aesthetics alone is insufficient to support legislation under the police powers. While this Court is hesitant to hold contra to the latest expression of the Supreme Court of Georgia, this Court is nevertheless persuaded that the statement in *Thomas* is obiter dictum, and the holding in *City of Smyrna* to be the prededent binding on this Court.

This Court therefore concludes that a municipal corporation may legally and constitutionally exercise its police powers based on aesthetics alone, and that the ordinance of the Defendant city is lawfully binding.

This Court, having found that the ordinance drawn under question is a valid ordinance, further finds that the prohibition of posting gasoline prices thereunder is a valid exercise of the Defendant's police powers. The states of Florida and Nevada have considered the validity of ordinances prohibiting such actions, the state of Florida holding that an ordinance's prohibition of posting signs is void. *Eskind V. Vero Beach*, 159 So. 2nd Fla. App.; the state of Nevada holding contra in the case of *Viale V. Foley*, 76 Nev. 149. The Courts of the state of Georgia have not had an occasion to rule on this issue. This Court finds, based upon the contents and provisions of the Defendant's ordinance, that it is reasonable in purpose, operation, and effect; and the prohibition of pricing is a legally valid exercise of police powers.

IT IS THEREFORE ORDERED that Plaintiff's Petition for Injunction be, and the same is, hereby denied.

This the 29 day of June, 1981.

/s/ BEN J. MILLER
HON. BEN J. MILLER
Judge, Superior Courts
Griffin Judicial Circuit

APPENDIX B

37934. H & H OPERATIONS, INC. v. CITY OF PEACHTREE CITY.

Hill, Presiding Justice.

This appeal raises the question of whether that part of the City of Peachtree City's sign ordinance which prohibits a business from posting prices on its sign is valid.

Plaintiff-appellant, which operates a self-service gasoline station within the limits of Peachtree City, filed suit after the City denied its application to post gasoline prices on its sign. The denial of plaintiff's application was based on the City's comprehensive sign ordinance which provides in pertinent part that "Each individual commercial business site shall be entitled to display one free-standing and one wall sign per site entry (provided entries are not closer than 250 ft.) . . . . These signs shall contain only the name of the person, business or activity occupying such premises, the standard business category of products and services available on such premises if not included in the name itself, or a registered logo or trademark which identifies the activity."

The trial court found that "The ordinance is clearly an attempt to exercise the city's police powers based solely on aesthetics," and denied relief, holding that "a municipal corporation may legally and constitutionally exercise its police powers based on aesthetics alone, and that the ordinance of the Defendant city is lawfully binding."

1. Under its police power, a municipality can enact and enforce reasonable regulations governing the erection and maintenance of signs within its jurisdiction. St Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269 (39 SC 274,

63 LE 599) (1919); *City of Doraville v. Turner Communications Corp.*, 236 Ga. 385, 387 (223 SE2d 798) (1976); *City of Smyrna v. Parks*, 240 Ga 699 (242 SE2d 73) (1978); Code Ann. §69-1207. The police power authorizes cities to enact ordiances to protect the health, morals, safety and general welfare of the public. 5 EGL Const. Law §103 (1977). The early cases dealt with billboard ordinances based primarily upon safety. More recent cases recognize that legislation based on aesthetics is within the public welfare aspect of the police power. "The concept of the public welfare is broad and inclusive. [Cit.] The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled'" Berman v. Parker, 348 U.S. 26, 33 (75 SC 98, 99 LE 27) (1954) (citation omitted). See also Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 132 (98 SC 2646, 57 LE2d 631) (1978). As we said in *City of Smyrna v. Parks*, supra, 240 Ga. at 705, a case involving a chain link fence ordinance: "Even if the ground of safety is deemed a tenuous one, however, the ordinance would not be an unwarranted exercise of police power based on aesthetics alone, provided there is a reasonable relationship between the regulation and the legitimate purposes of regulations, as enunciated by the legislature." But see *Thomas v. City of Marietta*, 245 Ga. 485, 486 (265 SE2d 775) (1980), where we upheld a portable sign ordinance on safety and welfare grounds.

We now hold that municipalities may enact and enforce reasonable sign ordinances under the general public welfare aspect of its police power, specifically aesthetics. Implicit in this holding is the subsidiary holding that such ordinances do not constitute a prohibited "taking" of property. *City of Smyrna v. Parks*, supra. Nor do we find the prohibition on posting prices to be unreasonable, arbitrary or discriminatory

as an exercise of the police power because the city council is better qualified than the courts to determine the necessity, character and degree of regulation required by local conditions. *City of Smyrna v. Parks*, supra, 240 Ga. at 702, 704.

2. However, our inquiry does not end with the police power because, as suggested above, although the early cases dealt with the police power, the most recent case, decided after the trial court's decision, applies the first amendment's freedom of speech clause to billboards. Metromedia, Inc. v. City of San Diego, _____ U.S. _____ (101 SC _____, 69 LE2d 800) (1981). In Metromedia, the Court adopted the four-part test of Central Hudson Gas & c. Corp. v. Public Service Comm., 447 U.S. 557 (100 SC 2343, 65 LE2d 341) (1980), and applied it to billboards: "(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective." Metromedia, Inc. v. City of San Diego, supra, 69 LE2d 815.

Unquestionably the plaintiff is entitled to the first amendment protection of commercial speech and the posting of prices of gasoline sold on the plaintiff's premises concerns a lawful activity as to which no claim is made that such prices would be misleading. But this ordinance fails at step 2 because the city has offered no substantial governmental interest other than aesthetics for permitting signs containing the name of the business and the category of products available on the premises, yet prohibiting the posting of the prices of those products.

In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (96 SC 1817, 48 LE2d 346) (1976), Virginia's prohibition on advertising prices of

prescription drugs was held to violate the first amendment. In Bates v. State Bar of Arizona, 433 U.S. 350 (97 SC 2691, 53 LE2d 810) (1977), Arizona's prohibition on advertising the prices of routine legal services was invalidated. Those prohibitions applied to all types of advertising (newspapers, radio, etc.), but in Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (97 SC 1614, 52 LE2d 155) (1977), the Court invalidated a sign ordinance which prohibited the posting of "For Sale" signs on real estate notwithstanding the fact that real estate offered for sale could be advertised in newspapers or listed with real estate agents. The Court found the alternative means of communication more expensive and less likely to reach persons seeking the information as well as less likely to reach persons not seeking the information. 431 U.S. at 93. We conclude that the alternative means of communicating gasoline prices available to plaintiff suffer from these same defects. People v. Mobil Oil Corp., 48 NY2d 192 (397 NE2d 724, 729–30) (1979).

We find no substantial governmental interest in permitting commercial signs yet prohibiting the posting of prices. Numbers (prices) are not aesthetically inferior to letters of the alphabet forming words (name of the business and products available). As stated by the Court in the San Diego case, supra (69 LE2d 816); "Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose." On the other hand: "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end,

the free flow of commercial information is indispensable." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, supra, 425 U.S. at 765. The city nevertheless suggests that the posting of prices is particularly unappealing to the eye during price wars, which proves the adage that "Beauty is in the eye of the beholder." Applying the careful scrutiny test of Metromedia v. San Diego, supra, in search of a substantial governmental interest, we are unable to discern it. Plaintiff is constitutionally entitled to post its gas prices on the sign with its name.

Judgment reversed. All the Justices concur, except Jordan, C. J., who dissents.

Decided Novebmer 4, 1981 –
Rehearing Denied November 18, 1981.
Injunction. Fayette Superior Court. Before Judge Miller.
James E. Sherrill, for appellant.
Asa Mitchell Powell, Jr., for appellee.